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Court of Appeals
Division III
State of Washington

NO. 34989-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION THREE

STATE OF WASHINGTON
v.
MICHAEL S. PERRY

ON APPEAL FROM
THE SUPERIOR COURT FOR STEVENS COUNTY
STATE OF WASHINGTON

The Honorable Allen C. Nielson, Judge

APPELLANT'S OPENING BRIEF

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

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RULES, STATUTES, AND OTHERS

A. ASSIGNMENTS OF ERROR

1. The police violated Perry's state constitutional right to be free from unlawful intrusion into his private affairs when the police began an investigation into Perry as a passenger without reasonable suspicion that he was involved in criminal activity.

2. The trial court erred in denying the 3.5 motion to suppress.

3. Perry assigns error to the 3.5 conclusion of law 2.

4. Perry assigns error to the 3.5 conclusion of law 3.

5. Perry assigns error to the 3.5 conclusion of law 4.

6. Perry assigns error to part of the 3.5 ruling that does not suppress all of Perry's statements in response to police questioning.

7. Perry assigns error to the 3.6 finding of fact B.

8. Perry assigns error to the 3.6 conclusion of law A.

9. Perry assigns error to the 3.6 order.

10. The state failed to prove that Perry appropriated or withheld stolen property.

11. The state failed to prove that Perry knowingly possessed stolen property.

12. The state failed to prove intent to commit a crime in the charges of identity theft.

13. Counsel was ineffective for failing to move to suppress Perry's statement about possessing methamphetamine.

14. The state failed to prove Perry possessed drug paraphernalia.

Issues Presented on Appeal

1. Did the police violate Perry's state constitutional rights to be free from unlawful intrusion into his private affairs when the police began an investigation into Perry as a passenger without reasonable suspicion that he was involved in criminal activity based on the driver informing the police that Perry owned the attached trailer that did not have a license plate?

2. Did the trial court err in denying Perry's 3.5 motion to suppress all of the statements made to the police where Perry was unlawfully detained and questioned without Miranda?

3. Did the trial court err in denying Perry's 3.6 motion to suppress all of the physical evidence seized as a result of the illegal detention without reasonable articulable suspicion or probable

cause related to Perry who was the passenger?

4. Did the trial court err in denying Perry's 3.5(1) motion to suppress all of the statements made to the police based on its misunderstanding that *Miranda* was not required when Perry was initially seized without probable cause?

5. Did the trial court err in concluding in its 3.5(4) conclusion of law that Officer Miller timely advised Perry of Miranda when this did not occur until after the custodial interrogation began?

6. Did the trial court erred in denying Perry's 3.6 motion to suppress all of the physical evidence seized as a result of the illegal detention?

7. Did the trial court err in entering 3.6 finding of fact A that the warrant was sufficient based on Harper's information that was not tested for bias or reliability under the *Aguilar – Spinelli* test?

8. Did the trial court err in its 3.6 conclusion of law by applying the "totality of the circumstances test" to determine Harper's reliability where that test only applies to the information known to the police at the time of the arrest and is unrelated to informants?

9. Did the trial court err in its 3.6 finding of fact B finding that

the warrant was sufficient based on the incorrect "totality of the circumstances test" rather than the correct *Aguilar-Spinelli* test?

10. Did the state fail to prove that Perry knew he was in possession of stolen property?

11. Did the state fail to prove that Perry appropriated or withheld stolen property?

12. Did the state fail to prove intent to commit a crime in the charges of identity theft?

13. Was the state required to prove beyond a reasonable doubt the unnecessary elements added to all of the possession charges, that Perry "obtained or withheld" stolen property?

14. Did the state fail to prove that Perry knew the motor vehicle was stolen?

15. Was Counsel ineffective for failing to move to suppress Perry's statement about possessing methamphetamine?

16. Did the state failed to prove Perry possessed drug paraphernalia?

B. STATEMENT OF THE CASE

a. 3.5 Hearing

After dark in January, Officer Watts stopped Jonathon Harper for a traffic infraction based on a defective brake light and no visible license plate. RP 34, 41. Harper was driving a Ford Bronco that was towing a flatbed. Id.

During the stop, Harper admitted that he used a magnetic license plate that must have fallen off the trailer, and he admitted that he knew that his brake lights were defective. RP41. Watts ran a license plate check on Harper's identification which revealed his license was suspended. RP 35-36. The Ford Bronco was registered to Harper. RP 40. Watts arrested Harper for driving with a suspended license. RP 36. While Watts was placing Harper in the patrol car, Chewelah Officer Matt Miller and State Trooper Jesse Dell arrived. RP 36.

Harper told the police he did not have registration for the trailer because the trailer belonged to Perry, the passenger. RP 34-35.

After questioning Harper about the ownership of the trailer, Watts asked Perry if he owned the trailer to which Perry "was kind of taken back

and went, "No, no, the trailer's not mine," and then he let me know, well, all the stuff on the trailer is his, and that he had borrowed it from a friend up in the Addy area." RP 99-100.

Watts asked Perry: "Who owns the trailer," 'cause there's no paper work, no license plate, and he just said it was – a guy that he knew outside of Addy owned the trailer as far as he knew'." RP 35. Watts could see household items on the trailer. RP 42-43. Perry said the trailer was not his, but the property on it was his. RP 35.

"[A] little bit afterwards" Dell investigated the trailer and located a VIN, which he ran through dispatch which revealed the trailer to be stolen. RP 36. Based on this report, Dell and Miller ordered Perry out of the truck, and placed him in handcuffs while Watts informed Perry that he was under arrest for possession of stolen property. RP 37.

Perry was searched incident to arrest. Id. According to Watts, Miller told Watts that Perry had been advised of Miranda and was willing to talk. RP 37. Miller testified that Perry did not want to talk to police and requested an attorney. RP 21, 37, 45. The court's findings reflect that Miller was correct that Perry requested counsel. CP 50.

When asked where he was going, Perry told Watts that he was moving his household but knew nothing about the snow mobile and that Harper arrived with it on the trailer. RP 38. When asked, Perry told the police he believed the snow mobile belonged to Harper. RP 38.

The police asked Mr. Perry if he had anything dangerous in his pocket, to which he answered, "Nothing other than my drugs." RP 43. Perry repeatedly admitted the admissibility of the drugs. RP 39, 65, 103-04, 119, 338; CP 59. Both the court and defense counsel struggled with understanding the chronology of the stop due to the confusing nature of the scene. RP 46-47.

Perry moved to suppress his pre-and post-*Miranda* statements:

> But as to the other inquiry about the trailer and the snowmobile and the time that the Miranda rights were or were not met, your Honor, I don't think that any of those statements should come in, under the confusing chronology of the time basis.

RP 46.

The Court suppressed all of the statements Perry made to Watts after he was advised of his Miranda rights, but permitted Perry's statements to Watts during the initial investigatory stage of the stop. RP 49; CP 50. The Court entered Conclusion of law 1.

> Miranda warnings are not required when a suspect has been stopped on reasonable suspicion for an investigation (Terry stop). Se. e.g., State v. Heritage, 152 WN.2d 210, 95 P.3d 345 (2009); State v. Marshall, 47 Wn. App. 322, 737 P.2d 265 (1987). Officer Watts's stop of the vehicle was jusitifed and the defendant's statements to the officer's investigative questioning are admissible. These include the defendant's statements regarding a friend's ownership of the trailer and statement admitting to ownership of the property on the trailer.

CP 50.

Counsel objected to this conclusion of law, arguing that Miranda was required at the initiation of the stop because Perry was detained and illegally questioned without reasonable articulable suspicion that he was involved in criminal activity. RP 65-66.

b. 3.6 Hearing

Based on an illegal detention without reasonable articulable suspicion that Perry was engaged in criminal activity, Perry moved to suppress under ER 3.6, all of the physical evidence except Perry's personal household goods and effects. Counsel also argued that Perry was not the focus of the detention and there was no information at the time of the seizure that the trailer or snow mobile was stolen. RP 66-69.

Counsel further argued that regardless of Perry's statements to police, there was insufficient evidence to permit the search and seizure

related to Perry because the later issued warrant did not contain adequate information connecting Perry to the stolen property, and the warrant contained unreliable and unverified information from Harper. RP 70-72.

In the 3.6 Conclusion of Law III A, the court found the warrant sufficient. CP 59; RP 81. The police believed they had probable cause to arrest Perry based on Harper telling them that the trailer belonged to Perry, even after Harper admitted that the license plates that fell off and the defective brake lights belonged to Harper. CP 59; RP 121, 221-224.

The Court entered, in relevant part, the following 3.6 finding of Fact B:

> B. During the stop, driver Johnathon Harper told Officer Watts the trailer and stuff on it were owned by his passenger, Michael S. Perry. Mr. Perry, in turn, agreed the stuff was his but that the trailer belonged to a friend from the Addy area. This information was sufficient to support Mr. Perry's arrest, accordingly, all of his subsequent statements made prior to invoking his right to remain silent are admissible.

CP 59.

The Court entered, in relevant part, the following 3.6 Conclusion of Law:

> III. CONCLUSION OF LAW
>
> A. Information from an informant, also a suspect, may be verified by independent investigation, State v. Huft,

> 106 Wn.2d 206, 209-10, 720 P.2d 838 (1986). Innocuous details, such as commonly known facts or easily predictable events, are not suitable verification. State v. Murray, 110 Wn.2d 706, 711-13, 757 P.2d 487 (1988). Here the driver, Jonathan Harp [sic], said the stolen trailer belonged to his passenger, Mr. Perry. Mr. Perry, in turn., said the trailer was not his but the stuff on it was his. He further stated the drugs in his pocket were his. **Taken as a whole**, this information comprised probable cause to arrest Mr. Perry and the information enough to make the Affidavit for the Search Warrant legally sufficient.

(Emphasis added) CP 59. The court ruled that the seized evidence was admissible. Id.

This timely appeal follows. CP 88.

c. Trial Facts

Watts stopped Harper for defective brake lights and a missing license plate. RP 96-97. Harper provided a Washington Identification card and registration for the truck, but did not have insurance or registration for the trailer. RP 97-98. Watts asked both Perry and Harper who owned the trailer. RP 99.

After questioning Harper about the ownership of the trailer, Watts asked Perry if he owned the trailer to which Perry said "he had borrowed it from a friend up in the Addy area." RP 99-100.

During this questioning, Trooper Dell ran a license check on Harper

and obtained a VIN number for the trailer. RP 102. The trailer was reported stolen and Harper was arrested for driving with a suspended driver's license. RP 101. The police arrested Perry for possession of the stolen trailer. RP 103-04. Prior to searching Perry, when asked if he had anything dangerous on his person, he stated "just my meth". RP 103-04.

The police obtained a warrant to search the trailer and Bronco. CP 59. Perry admitted that some of his household belongings were on the trailer he borrowed from a friend to move his household. RP 102-03. During a search of the trailer, the police found: a stolen snow mobile, a credit card belonging to Carol Horlacher, Idaho license plates 3B52148 that had been reported stolen, tax documents belonging to Amanda Jansen, and a red zippered semi-hard case containing small baggies, needles and spoons with residue. RP 113-127.

During the search of Harper's Bronco, the police found gift card visa cards with different names, hundreds of different types of keys for houses, mailboxes, vehicles and a shaved car key, along with garage door openers, digital scales, bolt cutters, a slim Jim, helmet and goggles and clothing related to the snow mobile. RP 113-115.

Harper plead guilty to reduced charges in exchange for testifying

against Perry. Harper testified that none of the property on the flatbed belonged to him, even though he was wearing the snow pants that came from the trailer and admitted to driving the snow mobile earlier in the day. RP 226, 257-58, 262.

Harper drove to Perry's house to help Perry move to a new house but testified that the flatbed trailer was at Perry's when he arrived, and Harper only attached it to his truck using his brake lights and license plates. RP 256-59.

Keith Edwards, rented space to Perry for the month prior to the arrest. RP 275-76. Perry lived in a trailer next to Edwards and had 2 box trailers on the property but never a flatbed trailer. RP 275-280. Edwards was home when Harper arrived and the only time Edwards saw the trailer was the day Harper was towing it with his Bronco. RP 277.

Perry rented a storage unit with ABC min-storage beginning in August 4, 2015. RP 170-71. The manger Sherry Henry testified that in February 2016, a Deputy Sheriff requested to see video footage of the entrance to the storage facility near Perry's unit. RP 173. The video revealed Perry at the storage unit January 16, 2016. RP 179. The video also showed Harper's Ford Bronco in front of Perry's storage unit. RP 211.

Amanda Abney testified that she thought that her tax documents were lost in the mail. RP 155-56. Abney did not know if her tax documents were stolen. RP 156. Don Brink testified that his snow mobile and a lot of gear was stolen in Spokane and later retrieved from the flatbed. RP 225-27. Brink did not know who stole his snow mobile and gear. RP 242.

Carol Horlacher testified that she learned after the fact that one of her Capitol One bills was missing in the mail. RP 157-60. There were no unauthorized charges to Horlacher's account. RP 162. The state did not present any evidence regarding the Idaho license plates other than Watts learning that they had been reported stolen. RP 125.

Bret Hullquist, the parts manager for Lithia the company that in July testified that a flatbed was stolen from his company. RP 163-65. The police identified Lithia's flatbed attached to Harper's Ford Bronco during Harper's arrest. RP 102, 185-85. 2015.

(i) Drug Paraphernalia

During the search of the trailer, the police found a red zippered semi-hard case sitting on tote that contained small baggies, needles, and spoons with residue. RP 126-27; Ex 49. The state argued that this case was consistent with drug use. Id.

C. ARGUMENTS

1. PERRY'S RIGHT TO PRIVACY WAS VIOLATED AS A PASSENGER, WHEN THE POLICE QUESTIONED HIM BASED ON A TRAFFIC STOP OF THE DRIVER, WITHOUT REASONABLE SUSPICION THAT PERRY WAS INVOLVED IN CRIMINAL ACTIVITY.

The police stopped the driver Harper for a defective brake light and a missing license plate on the trailer Harper was towing. RP 96-99. Perry was a passenger. RP 34-35. The facts are undisputed. Perry was detained and arrested without a warrant and without any exception to the warrant requirement.

The question raised does not relate to stopping the driver and the need for *Miranda*, but rather did the police violate Perry's right to be free from intrusion into his private affairs when police stopped the suspect Harper based on a traffic infraction, and impermissibly detained and questioned Perry, the passenger, to investigate their suspicions about the trailer without reasonable suspicion to believe that Perry possessed or stole the trailer or that the trailer was stolen.

a. Article 1, section 7.

This Court reviews de novo, whether undisputed facts constitute a violation of Article I, sec. 7 of the Washington Constitution. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). This provision provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." A warrantless search or seizure is considered per se unconstitutional unless it falls within one of the few exceptions to the warrant requirement. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

Art. I, sec. 7 provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution. *Rankin*, 151 Wn.2d at 694. Specifically, under art. 1 sec. 7, police have much more limited authority over passengers in a car than under the Fourth Amendment to the United States Constitution. *Rankin*, 151 Wn.2d at 694.

In Washington, passengers hold an independent constitutionally protected privacy interest that is not diminished merely upon stepping into an automobile with others. *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999); *see State v. Horrace,* 144 Wn.2d 386, 398, 28 P.3d 753 (2001) ("Citizens of this state do not expect to surrender their article I, section 7,

privacy guaranty when they step into an automobile with others.").

A traffic stop is a 'seizure' for the purpose of constitutional analysis. *Ladson*, 138 Wn.2d at 350 (citations omitted). When police stop a car, the passengers, along with the driver, are obviously restrained. *State v. Byrd*, 110 Wn. App. 259, 39 P.3d 1010 (2002). "Certainly passengers as well as the driver are 'seized' when a vehicle is stopped by police officers." Id. The passenger of a stopped car is "as effectively restrained from leaving the scene as.. . . the person sitting in the driver's seat." *State v. Stroud*, 30 Wn. App. 392, 396, 634 P.2d 316 (1981), *rev. denied*, 96 Wn.2d 1025 (1982).

Under an art. I, sec. 7 analysis, the question is whether police unreasonably intruded into the passenger's private affairs. *Parker*, 139 Wn. App. at 496-498; *Ladson*, 138 Wn.2d 343. Under an objective determination, looking at the police actions, a seizure occurs under art. I, sec. 7 "when considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." *Rankin,* 151 Wn.2d at 695 (*citing State v. O'Neill*, 148 Wn.2d 557, 564, 62 P.3d 489 (2003); *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998)).

When police investigate a passenger, or order a passenger to exit or return to the car, it is an unreasonable intrusion into the passenger's right to privacy unless police can "articulate an objective rationale." *Parker*, 139 Wn. App. at 496-498 (citations omitted). Search of a non-arrested passenger is not justified where officers lack articulable suspicion that he or she is armed or dangerous and there is no evidence to independently connect the passenger to illegal activity. *Parker*, 139 Wn. App. at 497-98.

For example, passengers are unconstitutionally detained under art. I, sec. 7 when an officer requests identification "unless other circumstances give the police independent cause to question [the] passengers." *Rankin,* 151 Wn.2d at 695-96; *State v. Larson*, 93 Wn.2d 638, 645, 611 P.2d 771 (1980).

"A passenger who is questioned by the police does not have the realistic alternative of leaving the scene without abandoning his chosen mode of transportation." *See* Wayne R. LaFave, *The Present and Future Fourth Amendment,* 1995 U. Ill. L. Rev. 111, 114-15. Here Perry was seized when the police stopped Harper in the mountains, on a dark, cold, snowy night.

The Court in *Rankin* succinctly prohibited questioning a passenger

without reasonable articulable suspicion concerning the passenger.

> [U]nder article 1, section 7, law enforcement officers are not permitted to request identification from a passenger for investigatory purposes unless there is an independent basis to support the request.

Rankin, 151 Wn.2d at 699; Accord, *Larson,* (Without an "independent cause" or reason to suspect the passenger has committed an offense, requesting an innocent passenger's identification is an unreasonable intrusion into the passenger's privacy in violation of art. 1 § 7.). *Larson*, 93 Wn.2d at 645.

. Art. I, sec. 7, unlike the Fourth Amendment, 'pegs' "the constitutional standard to 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a *warrant.*' *Rankin*, 151 Wn.2d at 695. (Emphasis in original).

In *Rankin,* the defendant was a passenger in a car that was stopped for a traffic infraction. The police did not observe Rankin involved in criminal activity, but recognized Rankin from a prior arrest for possession of stolen property and possession of a controlled substance. *Rankin*, 151 Wn.2d at 692. The police asked Rankin for identification which the deputy used to determine if Rankin had an outstanding warrant. Id. Rankin was

arrested because the search revealed an outstanding warrant. Id.

The Supreme Court reversed and suppressed holding that when the police officer "requested" or "required" the passenger to produce identification, he did so for the sole purpose of conducting a criminal investigation, without any articulable suspicion of criminal activity. *Rankin*, 151 Wn.2d at 689-700.

In *Larson*, the police used emergency equipment to stop the car in which Larson was a passenger. The car was stopped because it had been illegally parked--a minor traffic violation. One of the officers approached the driver while another officer "asked" Larson for her identification. When Larson opened her purse to retrieve her identification, the officer saw a plastic bag containing what he believed was marijuana. Larson was subsequently arrested and charged with possession of the marijuana. *Larson*, 93 Wn.2d at 640.

The Court in *Larson* held that police illegally seized Larson when they stopped the car and subsequently asked her for identification. *Larson*, 93 Wn.2d at 642. The officer's "request" for Larson's identification was an illegal seizure because the police lacked "independent cause" to justify their request. *Larson*, 93 Wn.2d at 645.

b. The Reasoning in *State v. Rankin* and *State v. Larson* Dictate that Perry Was Illegally Seized When Police Asked for Proof if He Had a Driver's License and Asked What He Knew About The Trailer.

The Supreme Court held in both *Rankin* and *Larson* that police requests for identification were unlawful detentions for investigative purposes. *Rankin*, 151 Wn.2d at 696, 699*; Larson*, 93 Wn.2d at 911. Here Watts asked Perry if he had a driver's license. After Perry stated that he did not, Watts, continued his investigation into the trailer by asking who owned the trailer and other related questions about the trailer. RP 99-104. This investigation was unlawful under *Rankin* and *Larson. Rankin*, 151 Wn.2d at 696-699*; Larson*, 93 Wn.2d at 911.

The present case is analogous to the *Larson and Rankin*. Here, as in both of these cases, the police stopped the driver based on a traffic infraction, not based on suspicious passenger activity. As in *Rankin* and *Larson*, without reasonable suspicion related to Perry, Watts asked Perry if he had a driver's license and then proceeded beyond *Larson* and *Rankin* to investigate the trailer before he had any "independent cause" (*Larson*, 93 Wn.2d at 645), or "other circumstances" that gave "the police independent cause to question [the] passengers." *Rankin,* 151 Wn.2d at 695-96.

This line of questioning was significantly more intrusive than asking for identification in *Rankin* and *Larson*. The police here, did not stop Perry for a missing trailer license plate. The police stopped Harper, who admitted that he was responsible for both the missing license plate and the defective brake lights attached to the trailer. RP 221-224, 259.

Like Rankin and Larson, Perry was an innocent passenger when the police demanded to know if he had a license and began questioning about the trailer. At that time, the police did not know that the trailer was stolen and when they discovered it was stolen, that fact was not related to Perry. Moreover, Harper had already admitted he was the one responsible for the trailer and its missing license plate and defective brake lights. Id. After Harper was arrested, he tried to avoid responsibility for the trailer by blaming Perry. RP 27.

There was no reason to believe that Harper was being honest in blaming Perry after he already took responsibility for the trailer. The circumstances surrounding Harper's arrest and blaming Perry did not create "other circumstances" to permit the "police independent cause to question [the] passengers." *Rankin,* 151 Wn.2d at 695-96. Accordingly, the police line of questioning here violated Perry's art. I, sec. 7 rights as

explained in both *Larson,* 93 Wn.2d 638 and *Rankin*. 151 Wn.2d 689.

Under *Rankin* and *Larson*, the questioning, search and seizure was an illegal intrusion into Perry's private affairs. The trial court should have granted Perry's motion to suppress the methamphetamine, all of his statements to police, and the physical evidence obtained as a fruit of the illegal seizure.

c. Remedy

Once the police interaction developed into an investigation, it violated art. I, sec. 7. The remedy for such violations is suppression of the evidence seized from the illegal detention and questioning.

2. THE TRIAL COURT ERRED IN DENYING PERRY'S MOTION TO SUPPRESS HIS STATEMENTS, AND PERRY HAS AUTOMATIC STANDING TO MOVE TO SUPPRESS HARPER'S STATEMENT MADE WHILE IN CUSTODY WITHOUT MIRANDA WARNINGS.

Perry's statements to the police should have been suppressed because they were made during a custodial interrogation tainted by the lack of timely *Miranda* warnings. Perry challenged finding of fact 1 and conclusion of law III. CP 50; RP 64-65.

a. Standard of Review

Appellate Courts review a trial court's conclusions of law at a suppression hearing de novo. *State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004). The Court reviews challenged findings of fact for substantial evidence. Substantial evidence is evidence that is enough evidence to persuade a fair-minded rational person of the truth of the finding. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Unchallenged findings are verities on appeal. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). The findings must, in turn, support the conclusions of law. *Vickers*, 148 Wn.2d at 116.

b. Perry Has Automatic Standing

In possession cases, "[a] person may rely on the automatic standing doctrine if the challenged police action produced the evidence sought to be used against him. *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). The Court in *Jones*, distinguishing *State v. Williams*, 142 Wn.2d 17, 23, 11 P.3d 714 (2000) and explained its reasoning in allowing automatic standing to protect the accused from having to choose between admitting possession to assert a privacy right, "thereby admitting the essential element in the case against him, or claim he did not possess the weapon, thereby losing his ability to challenge the

search, he is entitled to assert automatic standing to challenge the search. *Jones,* 146 Wn.2d at 332-33.

Under, *Jones,* Perry has automatic standing to challenge the questioning of himself and Harper because the challenged police action produced the evidence sought to be used against him. *Jones,* 146 Wn.2d at 334.

c. Perry Illegally Detained and Questioned

Article I, section 9, section 7 and the Fifth Amendment require law enforcement officers to advise a suspect of his *Miranda* rights before conducting a custodial interrogation. *Heritage*, 152 Wn.2d at 214. "Without *Miranda* warnings, a suspect's statements during custodial interrogation are presumed involuntary." *Heritage*, 152 Wn.2d at 214. Here, the police did not advise Perry of his right to remain silent prior to questioning him.

(i) Perry Unlawfully Detained

"The ultimate "'in custody' determination… [asks] first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*,

516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995).

Under *Terry,* police may briefly detain a person for questioning without grounds for arrest if they reasonably suspect, based on "specific, objective facts" that the person detained is engaged in criminal activity or a traffic violation. *State v. Day,* 161 Wn.2d 889, 896, 168 P.3d 1265 (2007) (citing *State v. Duncan*, 146 Wn.2d 166, 172-74, 43 P.3d 513 (2002)).

This "objective basis," or "reasonable suspicion," must consist of "specific, articulable facts which, together with objective and reasonable inferences form the basis for suspecting that the particular person detained is engaged in criminal activity." *State v. Creed*, 179 Wn.2d 534, 540, 319 P.3d 80 (2014) (*quoting United States v. Michael R*, 90 F.3d 340, 346 (9th Cir. 1996)).

In *Day,* the Court suppressed the unlawfully seized evidence and refused to extend *Terry* to parking infractions.

In *State v. O'Cain*, 108 Wn. App. 542, 545-46, 549, 31 P.3d 733 (2001), the police learned that the vehicle driven by the defendant was stolen and the "experienced" trooper observed activity consistent with drug transactions in an area known for such activity. Id. The trial court ruled the

stop permissible based on the experience of the officer and the fact that the vehicle was stolen. *O'Cain*, 108 Wn. App. at 549-50.

This appellate Court analyzed the propriety of stop under the Fourth Amendment. Id. Citing to *State v, Mance*, 82 Wn. App. 539, 542, 918 P.2d 527 (1996), this Court recognized that a report of a stolen vehicle does not contain sufficient reliability to permit the police to rely on that information because it does not necessarily implicate the driver. In *Mance*, the driver legitimately purchased the car, the dealer mistakenly reported as stolen, and the police failed to timely correct their stolen vehicle report. *O'Cain*, 108 Wn. App. at 550 (citing *Mance,* 82 Wn. App at 542).

During the struggle when Mance was resisting arrest, he spit out a large rock of cocaine. Id. This Court held that the police dispatch report indicating the vehicle driven by the defendant had been reported stolen, did not provide reasonable suspicion for the investigatory stop.

Here, the police only knew that the trailer attached to the Bronco did not have a license plate and that Harper accused Perry of ownership. These "specific objective facts" did not implicate Perry any more than in *O'Cain*. Rather, the report revealed that someone stole the trailer but there

was no reliable information that Perry knowingly possessed the stolen trailer. *O'Cain*, 108 Wn. App. at 550 (citing *Mance,* 82 Wn. App at 542).

(ii) Suppression Required

Evidence from an illegal detention and questioning must be suppressed. *State v. Allen*, 138 Wn. App. 463, 469, 157 P.3d 893 (2007). In *Allen,* the officer stopped a car driven by Peggy Allen for a traffic infraction. She had a male passenger, defendant Ryan Allen. A records check indicated that Peggy Allen was the protected person in a no contact order. The officer, however, had no information about the person against whom the order had been entered; he did not even know whether that person was male or female. *Allen*, 138 Wn. App. at 466. The officer removed Ms. Allen to the rear of the car and questioned her on matters unrelated to the traffic infraction, specifically, the name of the occupant of the car. *Allen*, 138 Wn. App. at 471. At that time, the police knew nothing about Mr. Allen. Id.

Nevertheless, the officer asked the passenger for identification. Both the passenger and the driver said that the passenger's name was Ben Haney. There was no record for that name, but further questioning of the driver disclosed that the passenger was Ryan Allen and that the no

contact order had been entered against him.

On appeal, passenger Allen challenged the question put to him, as well as to the questioning of the driver. The decision in *Allen* was based on the questioning of Allen, himself; and the holding focused on the questioning of the passenger appellant. *Allen*, 138 Wn. App. at 471-72.

The Court suppressed all of the statements made by Allen because the officer had no reason to ask for the passenger's name and the officer had no reason to suspect that the passenger was the person named in the no contact order. *Allen*, 138 Wn. App. at 471.

In Perry's case similar to *Allen* the police did not have reasonable suspicion to question Perry about his driver's license, the trailer or about anything when they stopped Harper for a traffic infraction. Even after the police learned that the trailer was stolen, the police had no idea the gender or identity of the thief or the person in possession of the trailer. Nonetheless, the police, without providing *Miranda* warnings, impermissibly questioned Perry just as the police impermissibly questioned Allen, about the no contact order. *Allen*, 138 Wn. App. at 471

Watts should have given Miranda warnings before questioning Perry as part of his investigation. The post-arrest Miranda warning did not

cure the earlier failure to provide Miranda because "'[a]s a practical matter, *Miranda* warnings are of little use to a person who has already confessed.'" *State v. Lavaris*, 99 Wn.2d 851, 859, 664 P.2d 851 (1983) (internal quotation omitted). A defendant who "'let the cat out of the bag by confessing" is not "'thereafter free of the psychological and practical disadvantages of having confessed.'" *Id*.

In *Erho*, a defendant made an oral admission with inadequate *Miranda* warnings. *State v. Erho*, 77 Wn.2d 553, 560-61, 463 P.2d 779 (1970). The defendant then reduced his oral statement to written form with proper *Miranda* warnings. *Id*. The Court held, "by his oral admissions the appellant had 'let the cat out of the bag by confessing' and was not 'thereafter free of the psychological and practical disadvantages of having confessed.' He could not get the cat back in the bag, for the secret was out... Thus, the voluntariness and admissibility of his written statement was compromised." *Id*. at 561 (internal quotations omitted).

Here, the first statement by Perry that he did not own the trailer and that the belongings on it were his, along with his other statements about his friend loaning him the trailer were made while detained but prior to *Miranda* warnings, and when Perry was finally advised of his Miranda

rights, he declined to speak. Advising at this time, did not permit Perry "get the cat back in the bag." *Erho*, 77 Wn.2d at 560-61. Thus, the voluntariness of the first statement was tainted and should be suppressed.

Finding fact 1 is not supported by the record and the conclusion of law is not supported by the findings because Perry was illegally detained and illegally questioned without *Miranda* warnings and without reasonable articulable suspicion or probable cause. *Vickers*, 148 Wn.2d at 116.

The court must also suppress Perry's admission to possessing methamphetamine and the methamphetamine itself because both were the result of the same illegal detention.

The stated charge Perry with unlawful possession of methamphetamine CP 34. To prove possession of methamphetamine, the state had to prove in count 3 that Perry "did possess a controlled substance…". RCW 69.50.4013(1).[1] If the police impermissibly obtained the methamphetamine from Perry as result of the unlawful seizure, then it must be suppressed.

Accordingly, the findings and conclusions must be vacated and Perry's responses about the trailer and related matters must be suppressed.

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[1] Amended 2017 (S.S.B. 5131) (not applicable to this case).

3. THE TRIAL COURT ABUSED ITS DISCRETION IN RULING THE EVIDENCE ADMISSIBLE IN THE 3.6 HEARING BASED ON AN INVALID WARRANT.

The trial court erred in denying the motion to suppress physical evidence and erred in concluding that Harper's statements were sufficient to support the search warrant under the wrong test.

The trial court erroneously relied on *Huft*, 106 Wn.2d at 209-10, to justify the warrant in this case. CP 59. The trial court, in its conclusion of law applied the "totality of the circumstances test", that the Court in *Huft*, expressly recognized as having been rejected in *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984). *Huft*, 106 Wn.2d at 209-10. In its place, the Court in *Jackson*, reiterated the applicability of the *Aguilar-Spinelli*,[2] 2 part test:

> For an informant's tip (as detailed in an affidavit) to create probable cause for a search warrant to issue: (1) the officer's affidavit must set forth some of the underlying circumstances from which the informant drew his conclusion so that a magistrate can independently evaluate the reliability of the manner in which the informant acquired his information; and (2) the affidavit must set forth some of the underlying circumstances from which the officer

[2] This test does not apply under the Fourth Amendment. *Illinois v. Gates,* 462 U.S. 213, 228, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1993).

> concluded that the informant was credible or his information reliable.

Jackson, 102 Wn.2d at 435 (*citing to Spinelli v. U.S.*, 393 U.S. 410, 413, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964)).

The "totality of the circumstances" test applies to determine the propriety of an investigative stop – to analyze the reasonableness of the police suspicions. *State v. Snapp*, 174 Wn.2d 177, 198, 275 P.3d 289 (2012). Here, because the police information was based on Harper's statement that the trailer belonged to Perry, the *Aguilar-Spinelli* test applies. *Huft*, 106 Wn.2d at 209-10. The court commits reversible error when in admits evidence under the wrong standard. *Huft*, 106 Wn.2d at 21 (error to apply wrong standard).

To assure consistence with art. I, sec. 7, the Supreme Court has required "some scrutiny" when an informant provides the police information. *Huft*, 106 Wn.2d at 209 (*citing State v. Wolken*, 103 Wn.2d 823, 827, 700 P.2d 319 (1985)). The Court in *Huft* recognized "that an affidavit using an informant's tips to establish probable cause must establish **both** the basis of information and the credibility or reliability of

the informant." *Huft*, 106 Wn.2d at 209-10 (Emphasis added) (citations omitted).

"[I]f an informant's tip fails under either or both prongs, probable cause still may be established by independent police investigation." *Huft,,* 106 Wn.2d at 210. In *Huft* there were two separate informants who provided information at different times regarding a grow operation. The police independently verified information related to a grow operation by checking electrical records and observing a bright light emanating from the suspect's basement. *Huft,* 106 Wn.2d at 210-11.

The Supreme Court in *Huft* noted that the police did not feel the informants' tips adequate without investigating the electrical consumption and bright lights. Even though the police were able to verify the informant's tips, this did not make the informants' tips more reliable or provide a basis, rather it verified that the informants' had personal knowledge of the defendants but not of their illegal activities. *Huft,* 106 Wn.2d at 211. The Court reversed because the trial court used the wrong *Gates, supra* standard, and because there was insufficient information to support the warrant. *Huft,* 106 Wn.2d at 212.

Here, the trial court relied on *Huft* to support the notion that the police may conduct independent investigation to verify a suspect's veracity (Harper's) and the basis for his tip under the wrong standard. CP 59. This was error. *Huft,* 106 Wn.2d at 210-12.

Under the correct *Aguilar-Spinelli*, standard, the police investigation did not verify either the basis or reliability of Harper's accusation. The fact that the police independently learned that the trailer and snow mobile were stolen did not in any manner indicate that Harper was being truthful in accusing Perry rather than accepting responsibility for these crimes. And the fact that the trailer and snow mobile were stolen also did not in any manner establish a basis for the reliability of Harper's statements.

Rather, the investigation here established that a crime had been committed. Harper had reason to lie to avoid criminal responsibility, more so then in *Huft*, where the informants were working for the police. In *Huft*, the Court held the affidavit of probable cause for the search warrant was insufficient and the remedy was suppression of the illegally seized evidence. *Huft*, 106 Wn.2d at 212.

Here there was far less information than in *Huft* where the police verified the bright light and electrical consumption records. There was no

evidence that Harper's accusation was accurate and there was no basis to connect Perry to the stolen trailer other than the unreliable accusation. Accordingly, the warrant was defective because the state applied the wrong test and there was insufficient evidence to meet the *Aguilar-Spinelli* test. *Huft,* 106 Wn.2d at 212.

Based on this authority, Perry respectfully requests this Court reverse for suppression all of the illegally seized evidence and remand for dismissal with prejudice.

4. PERRY WAS DENIED DUE PROCESS WHERE THE CHARGING DOCUMENT CONTAINED ADDITIONAL NON- ESSENTIAL ELEMENTS THAT THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT.

Here the state charged Perry with possession of stolen property in the second and third degree, possession of a stolen motor vehicle, and identity theft. CP 69. The state added to all of these possession charges, definitional language in the charging document that was not required: "that the defendant withheld or appropriated" the property. Id.

a. Possession Stolen Property/Snow Mobile

In count 2 the state added to the information, the unnecessary definitional language set forth in the to-convict instruction. It provided in

relevant part:

> Perry....did knowingly possess...a 2008 Big Tex trailer, of a value in excess of $750, but less than $5,000, **knowing that it had been stolen, and did withhold or appropriate the property to the use of a person other than the true owner or person entitled thereto**

(Emphasis added) CP 69. The information charging possession of stolen property in the third degree in count 5 similarly added the same unnecessary definitional language:

> Perry....did knowingly possess, receive, retain, conceal, dispose of stolen property, to-wit **Idaho vehicle license plates 3B52148** with a value in excess not in excess of $75, knowing it was stolen **and withheld such property the use of a person other than Janet or Bernard Schroeder, the true owners or persons entitled to such property"**

(Emphasis added) CP 69.

The essential elements under the statutes are as follow. Under RCW 9A.56.160:

> 1) A person is guilty of possessing stolen property in the second degree if:
>
> (a) He or she possesses stolen property, other than a firearm as defined in RCW 9.41.010[3] or a motor vehicle, which exceeds seven hundred fifty dollars in value but does not exceed five thousand dollars in value;

[3] Definition of firearm amended 2017 Wash. Legis. Serv. Ch. 264 (S.S.B. 5552).

Id. In relevant part, under RCW 9A.56.170

> (1) A person is guilty of possessing stolen property in the third degree if he or she possesses (a) stolen property which does not exceed seven hundred fifty dollars in value

Id. The state did not add the unnecessary language to the charging document in count 1, possession of a stolen vehicle, but the court added unnecessary language to the to-convict instruction 6 for possession of a motor vehicle:

> To convict the defendant of the crime of possessing a stolen motor vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about January 30, 2016, the defendant knowingly possessed motor vehicle;
> (2) That the defendant acted with knowledge that the motor vehicle had been stolen;
> (3) That the defendant **withheld or appropriated** the motor vehicle to the use of someone other than the true owner or person entitled thereto;
> (4) That any of these acts occurred in the State of Washington.
> .....

(Emphasis added) CP 69.

Recently, our State Supreme Court clarified that the definitional elements in possession of stolen property are not essential elements that must be included in the information. *State v. Porter*, 186 Wn.2d 85, 94-92,

375 P.3d 664 (2016).

In *Porter*, the charging document was sufficient because it referenced the applicable criminal statutes and stated that the defendant did unlawfully and feloniously knowingly possess a stolen motor vehicle." The state did not need to include the language defining "possess", that specified that the defendant "withheld or appropriated" the vehicle from the true owner. *Porter*, 186 Wn.2d at, 87, 90-92.

However under the Law of the Case doctrine, "[i]n criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 90 (1998); *Accord, State v. Jussila*, 197 Wn. App. 908, 931-32, 392 P.3d 1108 (2017).

In *Hickman*, the state added the non-essential element of the **county** in which the crime was allegedly committed. *Hickman*, 135 Wn.2d at 100. The Court held that the state was required to prove beyond a reasonable doubt the county, the unnecessary element it added in the "to-convict" instruction. *Hickman*, 135 Wn.2d at 102, 105 (citations omitted).

Similarly, in *Jussila*, the state added to the to-convict instructions,

the non-essential elements of the serial numbers for the stolen firearms. *Jussila*, 197 Wn. App. at 916-19. The Court in *Jussila,* applying *Hickman*, held the state was required to prove the serial numbers it added to the to-convict instructions. *Jussila*, 197 Wn. App. at 931.

b. Hickman Applies to This Case

Hickman applies to counts 1, 2 and 5 in this case and required the state to prove the non-essential elements listed in the charging document (2 and 5) and mirrored in the to-convict instructions.

The to-convict instruction 7 for possession of stolen property in the second degree provided:

> To convict the defendant of the crime of possessing stolen property in the second degree, as charged in Count 2, each of the following five elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about January 30, 2016, the defendant knowingly possessed stolen property, a trailer;
> (2) That the defendant acted with knowledge that the property had been stolen;
> (3) **That the defendant withheld or appropriated the property** to the use of someone other than the true owner or person entitled thereto;
> (4) That the stolen property
> exceeded $750 in value but did not exceed $5,000 in value;
> (5) That any of these acts occurred in the State of Washington.
> .....

(Emphasis added) CP 69.

Instruction 10 the to-convict for possession of stolen property in the third degree provided:

> To convict the defendant of the crime of possessing stolen property in the third degree as charged in Count 5, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about January 30, 2016, the defendant knowingly possessed, receive, conceal, dispose of stolen property not exceeding $750 in value, Idaho license plates;
> (2) That the defendant acted with knowledge that the property has been stolen;
> (3**) That the defendant withheld or appropriated the property** to the use of someone other than the true owner or person entitled thereto; and
> (4) That any of these acts occurred in the State of Washington.
> .....

(Emphasis added) CP 69. The court added the same language for instruction 6 for count 1. CP 69.

Under *Hickman,* and *Jussilia*, the language in the to-convict instructions "withheld or appropriated the property", became the law of the case that the state was required to prove beyond a reasonable doubt. *Hickman*, 135 Wn.2d at 102, 105; *Jussila*, 197 Wn. App. at 931. The state was also required to prove that Perry knew the items were stolen. RCW 9A.56.160, .170.

c. Sufficiency

In every criminal prosecution, due process requires the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In a challenge to the sufficiency of the evidence, the court views the evidence in the light most favorable to the prosecution and inquires whether the evidence was sufficient for a rational trier of fact to find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), *overruled on other grounds by Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014).

When evaluating whether sufficient evidence exists, the reviewing court assumes the truth of the state's evidence and all reasonable inferences drawn from that evidence. *Homan*, 181 Wn.2d at 106. Circumstantial evidence is treated the same as direct evidence. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016).

More than a mere scintilla of evidence is needed to meet the beyond a reasonable doubt standard; "there must be that quantum of

evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved." *State v. Miller*, 60 Wn. App. 767, 772, 807 P.2d 893 (1991), *abrogated on other grounds in State Roggenkamp,* 153 Wn.2d 614, 106 P.3d 196 (2005).

In *State v. Liles*, 11 Wn. App. 166, 521 P.2d 973 (1974), the court explained:

> When substantial evidence is present, the drawing of reasonable inferences therefrom and the doing of some conjecturing on the basis of such evidence is permissible and acceptable. If, however, the necessity for conjecture results from the fact that the evidence is merely scintilla evidence, then the necessity for conjecture is fatal.

Liles, 11 Wn. App. at 171 (*citation omitted*); *accord, State v. Harris*, 14 Wn. App. 414, 417–18, 542 P.2d 122 (1975).

(i). Possession of Stolen Property in the Second and Third Degree, and Possession of a Stolen Motor Vehicle.

"Bare possession of stolen property is insufficient to justify a conviction," for possession of a stolen property. *State v. McPhee,* 156 Wn. App. 44, 62, 230 P.3d 284 (2010) (firearm). Knowledge may be proven if there is information from which a reasonable person would conclude the fact at issue. *State v. Shipp*, 93 Wn.2d 510, 514, 516, 610

P.2d 1322 (1980).

For example in *United States v. Howard*, 214 F.3d 361, 364 (2d Cir. 2000) the Second Circuit explained that the issues of illegal possession of a firearm do not establish knowledge that the purchased weapon was stolen. The Court reasoned:

> [T]he fact that appellant may have known that as a convicted felon he could not lawfully obtain a firearm does not tend to prove that he had reason to know that the gun in question was stolen. We have no basis on this record or on the arguments made to us to opine that such a significant portion of guns sold on the 'black market' are stolen that a purchaser would likely share such knowledge and believe that any particular gun sold on that market was even highly likely to have been stolen.

Howard, 214 F.3d at 364; *Allen*, 138 Wn. App. at 471.

Similarly, here, the fact that the police believed that Perry possessed stolen items does not suggest that he knew the items were stolen. The owners testified that their belongings were stolen but none had any idea how the items were stolen or who was responsible for the thefts. RP 125, 155-66, 225-27, 242.

In a possession of stolen property case, if the accused makes inconsistent or improbable statements about how the item came into the

possession of the person, this can be considered slight additional evidence sufficient to establish the knowledge element. *State v. Pisauro*, 14 Wn. App. 217, 220–21, 540 P.2d 447 (1975); *State v. Withers*, 8 Wn. App. 123, 128, 504 P.2d 1151 (1972), *citing State v. Portee*, 25 Wn.2d 246, 170 P.2d 326 (1946). *See also*, *State v. Ladely,* 82 Wn.2d 172, 174-76, 509 P.2d 658 (1973) (evidence sufficient to establish guilt where defendant gave police three different versions about his ownership of stolen antique gun).

Likewise, familiarity with the location of the theft when combined with a dubious explanation has also been held sufficient to show knowledge that property was stolen. *State v. Smyth*, 7 Wn. App. 50, 499 P.2d 63 (1972).

For example, Smyth admitted he had visited the home the property was stolen from on several occasions. *Smyth*, 7 Wn. App at 51–52. There was also evidence he attempted to obtain a fictitious bill of sale while he was in jail awaiting trial. Id. at 52–54. On appeal, the court held that these facts, taken together, were sufficient to submit the question of guilt to the jury. *Smyth*, 7 Wn. App at 53–54.

In Perry's case, there was no information about how or where the

items were stolen, and the issue of possession was always in dispute. The police located the trailer attached to Harper's truck with a snow mobile attached on top. Harper admitted control over the trailer and Perry explained that his belongings were on the trailer because he was moving.

The police found stolen property on the trailer, however, the evidence associating Perry with the trailer was limited to his, arguably inadmissible statement that his belongings were on the trailer because he was moving. This evidence was not inconsistent and there was no evidence that Perry was in the location of any of the thefts. Harper, not Perry made inconsistent statements, first taking responsibility for the trailer and then passing blame for the trailer to Perry. There was no corroborative evidence like in *Smyth* or *Ladley*. *Smyth*, 7 Wn. App at 53–54; *Ladely,* 82 Wn.2d at 172, 174-76.

The day of the arrest, Edwards saw Harper drive up in his Bronco with a flatbed attached, with a snow mobile strapped to the trailer. RP 277. Edwards also believed that Perry owned his own snow mobile. RP 278-79. When arrested, Perry told the police that his household goods were on the trailer and Harper owned the snow mobile. RP 38, 220. Harper admitted to riding the snow mobile and to wearing the snow suit that was also

stolen. RP 257, 262, 264.

All of the owners of the stolen property testified that they had missing property, but none knew how or precisely when the property was stolen, except the trailer that was limited to a specific day. There is no dispute in this case that someone stole the trailer, snow mobile and other property. There was however, no evidence whatsoever that Perry knew the items in question were stolen. There was also inadequate evidence to establish that Perrey appropriated or withheld the property.

Perry believed that the trailer belonged to a friend. Keith Edwards testified that Perry had lived in a trailer on this property and that Perry owned 2 box trailers that he kept on the property but not a flatbed. RP 275-76. The day of the arrest, Edwards saw Harper drive up in his Bronco with a flatbed attached to the truck Harper owned. RP 277. Even if the jury did not believe this, it is equally plausible that Perry had no idea that the trailer was stolen.

There was no reliable, admissible information that Perry possessed the trailer, the snow mobile, or the other stolen property. *Homan*, 181 Wn.2d at 106.

There was no evidence that Perry had any familiarity with the

location of the thefts and there were no improbable, inconsistent statements. Rather, the state simply proved in each of the counts that someone stole the missing property and snow mobile. But that evidence did not establish that Perry possessed or knew the items were stolen. Accordingly, this Court must reverse and remand for dismissal with prejudice.

(ii) Possession of Drug Paraphernalia.

The stated charge Perry with unlawful possession of drug paraphernalia. CP 34. To prove count 4, the state had to prove that Perry "did use, drug paraphernalia to process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, inhale, or otherwise introduce into the human body a controlled substance, other than marijuana." RCW 69.50.421(1). For this counts the jury instructions mirrored the charging document. CP 69.

Similar to the other possession charges, the state failed to prove that Perry possessed the red case, or that he used it in any manner for any purpose. Like the other evidence, it was found on the trailer but there was inadequate admissible evidence to connect Perry to the red case.

Accordingly, this charge too should be reversed for insufficient evidence.

Viewing the evidence in the light most favorable to the state does not establish by reasonable inference the essential elements in the possession charges.

Accordingly, this Court must reverse and remand for dismissal with prejudice.

(iii) Identity Theft

The state failed to prove beyond a reasonable doubt the essential element of identity theft in the second degree that Perry 'possessed' the property in counts 6 (Carol Horlacher) and 7 (Amanda Jansen) with intent to commit a crime. There were no illegal charges on the credit card account, and there was no reported misuse of the tax documents.

A person commits identity theft when a person "knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the **intent to commit**, or to aid or abet, any crime." (emphasis added) RCW 9.35.020. The victim must also be a "specific real person." *State v. Fedorov*, 181 Wn. App. 187, 193-94, 324 P.3d 784 (2014) (citation omitted).

In *Fedorov*, the defendant was charged with identity theft by

misusing a person's identity. He challenged the state's evidence as insufficient to support the element that he intended to commit a crime. *Fedorov*, 181 Wn. App. at 195. Fedorov repeatedly told the police that his name was Zachary Anderson. Id. Fedorov also gave Anderson's date of birth as his own and was arrested under Anderson's warrant. Id.

The Court held that "[g]iven Fedorov's multiple acts of intentional deception, a rational trier of fact could infer that he intended to violate the false statement statute, RCW 9A.76.175." *Fedorov*, 181 Wn. App. at 196.

In contrast to *Fedorov*, in Perry's case, in count 6, Perry did not give a false name, and he did not use Carol Horlacher's credit card information. Horlacher testified that there were no unidentified charges on her account and she had been unaware that her credit card bill was missing. RP 160-162.

Similarly, in count 7, Amanda Jansen testified she thought her tax return was lost in the mail, RP 156. The tax returns had been sent to her parent's address, an address Jansen no longer used. RP 155-156. Jansen did not report any suspicious activity related to her tax documents and had never met Perry. RP 157.

The evidence in counts 6 and 7 does not in any manner indicate

that Perry intended to commit a crime with the credit card or tax information. Rather, the evidence simply established that it was found among Perry's other belongings. RP 120, 123. Under *Fedorov*, this evidence is insufficient to establish beyond a reasonable doubt intent to commit a crime.

Accordingly, this Court must reverse for dismissal with prejudice both convictions for identity theft.

5. PERRY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S AGREEMENT THAT PERRY'S STATEMENT WAS ADMISSIBLE REGARDING POSSESSING METHAMPHETAMINE.

a. Test For Ineffective Assistance of Counsel.

The standard of review for a challenge to the effective assistance of counsel is de novo. *State v. Sutherby,* 165 Wn.2d 970, 983, 204 P.3d 916 (2009). A defendant has an absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); *Strickland v. Washington,* 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Sixth Amendment to the U.S. Constitution and Wash. Const. article I, section 22.

While counsel is presumed effective, this presumption is overcome where the defendant establishes that (1) defense counsel's representation was deficient; falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *Sutherby,* 165 Wn.2d at 883; *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required. *State v. Hawkins,* 157 Wn. App. 739, 747, 238 P.3d 1226 (2010), *review denied,* 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *Grier*, 171 Wn.2d at 33 (citing, *State v. Reichenbach,* 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho,* 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999)).

Trial strategies and tactics are thus **not** immune from attack on grounds of ineffective assistance of counsel. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores–Ortega,* 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client

about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that "there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *State v. Nichols,* 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If a party fails to satisfy one element, a reviewing court need not consider both *Strickland* prongs. *State v. Foster,* 140 Wn. App. 266, 273, 166 P.3d 726, *review denied,* 162 Wn.2d 1007 (2007).

b. Prejudicial Deficient Representation

A defendant is prejudiced when counsel fails to make a motion to suppress prejudicial, inadmissible evidence that would have been suppressed. *State v. Hamilton*, 179 Wn. App. 870, 882, 320 P.3d 142 (2014). In *Hamilton*, trial counsel moved to suppress evidence found in a purse that Hamilton's husband retrieved from their joint home, based on a warrantless home entry. *Hamilton*, 179 Wn. App. at 876-77. Counsel did not move to suppress based on an unlawful warrantless search of the purse. Id.

The police did not have a warrant to search Hamilton's home or her purse and there were no exigent circumstances. *Hamilton*, 179 Wn. App.

at 879-80. Hamilton did not consent to her husband removing the purse from the home, there was no evidence of abandonment, and Hamilton alone had the power to consent to the search, not her husband. Id.

The Court held that "these facts give rise to a valid argument for suppression based on an unlawful warrantless search of a purse in which Hamilton had an expectation of privacy." *Hamilton*, 179 Wn. App. at 880. In finding prejudice, the Court explained that "[m]oving to suppress the evidence would not have involved any risk to Hamilton. Id. If she prevailed, the charges would be dismissed. If the motion was denied, she could proceed to trial." Id.

The Court reversed and dismissed Hamilton's conviction because there was no tactical reason to fail to move to suppress the search of the purse, there was no risk to Hamilton, and she would likely have prevailed on a motion to suppress. *Hamilton*, 179 Wn. App. at 888.

In *Reichenbach*, 153 Wn.2d at 126, the driver consented to a search of the car in which Reichenbach was a passenger. The Court cited to *Parker,* 139 Wn.2d 486, to hold that the driver's consent to search did not encompass consent to seize Reichenbach. *Reichenbach*, 153 Wn.2d 134-37. As in *Parker,* the officers needed an independent basis to justify

Reichenbach's seizure and as in *Parker,* there was no probable cause for the custodial arrest. The Court suppressed the illegally obtained methamphetamine because it was obtained as a result of an illegal arrest; Reichenbach involuntarily abandoned methamphetamine in the car. *Reichenbach*, 153 Wn.2d 134-37.

Here, counsel did not only fail to move to suppress the statement about possessing methamphetamine, but he also "agreed" that both Perry's statement and the methamphetamine were admissible. RP 39, 65, 103-04, 119, 338. Counsel's relieving the state of proving possession of methamphetamine was inconsistent with his duty to represent his client. *Strickland,* 466 U.S. at 688; *State v. Yung-Cheng Tsai*, 183 Wn.2d 91, 100, 351 P.3d 138 (2015). It was also inconsistent with his argument that the police illegally detained, questioned and searched Perry, and that the court should have suppressed Harper's statements regarding Perry. RP 69-72, 82.

Counsel seemed to confuse the police ability to search for dangerous weapons with the admissibility of drugs based on Perry admitting to possessing methamphetamine when asked if he had anything dangerous in his pocket. RP 79-80.

This case is similar to *Hamilton*, where counsel understood the need to move to suppress the illegally obtained drugs but failed to move to suppress based on an unlawful search of the purse rather than the house. Here, counsel too understood the need to move to suppress and alternately moved to suppress everything and then agreed the methamphetamine was admissible pursuant to a valid search for weapons. RP 39, 65, 69-72, 103-04, 119, 338.

Similar to *Reichenbach* and *Hamilton*, there was no risk to counsel in adhering to his motion to suppress all of Perry's statements. That would have been effective assistance of counsel consistent with counsel's argument that Perry was unlawfully detained without reasonable suspicion. RP 71-72. It defies logic, precedent and falls below an objective standard of reasonableness for counsel to agree that the police may search Perry incident to an unlawful detention that was followed with an unlawful request for dangerous weapons, where there was no evidence to independently connect Perry to illegal activity. *Parker*, 139 Wn. App. at 497-98.

Perry was prejudiced just as Hamilton and Reichenbach were prejudiced by the use of the methamphetamine to support a conviction.

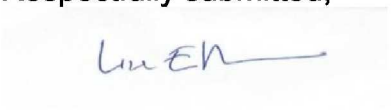
Under *Hamilton, Reichenbach* and *Parker*, counsel was deficient to Perry's prejudice by agreeing that the methamphetamine was legally seized. Accordingly, this Court must remand for a new trial.

D. CONCLUSION

Michael Perry respectfully requests this Court reverse his possession convictions and identity theft convictions and remand for dismissal with prejudice. In the alternative, Perry moves for remand for a new trial.

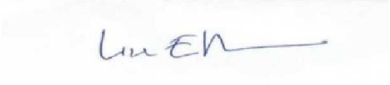
DATED this 2nd day of June 2017.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Stevens County Prosecutor at trasmussen@co.stevens.wa.us and Michael S. Perry/DOC#777623, Airway Heights Corrections Center, PO Box 2049, Airway Heights, WA 99001 a true copy of the document to which this certificate is affixed, on June 2, 2017. Service was made electronically to the prosecutor and via U.S. Mail to Michael S. Perry.



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LAW OFFICES OF LISE ELLNER

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